LEE YOKE SAN v. TONG LEE HWA & ANOR.

[O.C.J. (Abdul Hamid J.) May 23 and July 28, 1977]
[Kuala Lumpur — Civil Suit No. 3 of 1973]

Practice and Procedure — Pleadings — Defence — Striking out as disclosing no reasonable answer and as being frivolous and vexatious — R.S.C. 1957, O. 64 r. 13 and O. 70 r. 1(1).

The applicant applied for an order that the defence of the first and the second defendants/respondents be struck out as disclosing no reasonable answer and as being frivolous and vexatious and that the plaintiff be at liberty to sign judgment against both respondents in terms of the prayers in the Statement of Claim and costs. The plaintiff in his affidavit disclosed that by Order of Court dated December 15, 1969 in a Probate Suit in Kuala Lumpur he agreed at the request of the solicitors for the respondents to act as valuer pursuant to the provisions of a certain agreement. On April 21, 1971 the plaintiff received a letter from the solicitors requesting him to proceed with the matter which he did accordingly. He sent 3 copies of the valuation of the properties in question to the solicitors and a bill for the sum of $34,464.25. On March 9, 1975 the plaintiff sent a copy of the valuation of the shares in accordance with their request contained in a letter and two copies to Chi Liung & Sons Sdn. Bhd. A bill for a sum of $1,500 for work done was also submitted. It was averred that the solicitors verbally requested the plaintiff to secure payment from Chi Liung & Sons Sdn. Bhd. Pursuant to the request the plaintiff made out the bills against the company. The company did not pay the bills. As a result the plaintiff brought this action against both respondents since they authorised the work to be done on their behalf. The first respondent in his defence stated that he was the Managing Director of Chi Liung & Sons Sdn. Bhd. and if any instruction was given it was done at the request and on behalf of all the parties to the consent order in the Probate Suit and not in his personal capacity. He denied the sum of $35,964.25 was due and owing and contended that in any event he was not personally liable. The second respondent's defence was a total denial.

Held: the circumstances in the present case showed that the Statement of Defence of both the first and the second respondents to be frivolous and vexatious and an abuse of the process of the court and therefore the application should be allowed. For these reasons the court ordered the defence of both respondents to be struck out and that final judgment be entered in favour of the applicant with costs.

Cases referred to:-

(1) *Rev. Oswald Joseph Reichel* v. *Rev. John Richard Magrath* (1889) 14 App. Cas. p. 665 at p. 668.

(2) *Remington v. Scoles* [1897] 2 Ch. 1 at pp. 4, 6 and 7.

CIVIL SUIT.

S.D.K. Peddie for the plaintiff/applicant.

Adam C.R. Mohamed Ibrahim for the defendants/respondents.

Abdul Hamid J.: Lee Yoke San the applicant is asking for an order that the defence of the first and the second defendants/respondents be struck out as disclosing no reasonable answer and as being frivolous and vexatious and that the plaintiff be at liberty to sign judgment against both respondents in terms of the prayers in the statement of claim and costs.

The affidavit deposed by the plaintiff discloses that by order of court dated December 15, 1969 in the matter of Kuala Lumpur High Court Probate Suit No. 3 of 1969 the plaintiff agreed to the request by Messrs. Richard Talalla & Co. acting for the respondents to act as valuer pursuant to paragraph 6 of the agreement attached to the plaintiff's affidavit marked "LYS2."

On April 21, 1971 the plaintiff received a letter from Messrs. Richard Talalla & Co. requesting him to proceed with the matter (see "LYS5" and "LYS6").

On October 12, 1971 the plaintiff sent three copies of the valuation of the properties to Messrs. Richard Talalla & Co. and a bill for a sum of $34,464.25.

On March 9, 1975 the plaintiff sent a copy of the valuation of the shares in accordance with their request contained in "LYS7" and two copies to Chi Liung & Sons Sdn. Bhd. A bill for the sum of $1,500 for the work done was also submitted.

It is averred that Messrs. Richard Talalla & Co. verbally requested the plaintiff to secure payment from Chi Liung & Sons Sdn. Bhd. Pursuant to the request the plaintiff made out the bills against the company (see "LYS10"). The company did not pay the bills.

By reason of the matters aforesaid the plaintiff brought this action against both respondents since they authorised the work to be done on their behalf.

The defence of the first respondent states that he was the managing director of Messrs. Chi Liung & Sons Sdn. Bhd. and if any instruction was given it was done at the request and on behalf of all the parties to the consent order in Probate Suit No. 3 of 1969 and not in his personal capacity. He denies that a sum of $35,964.25 is due and owing and contends that in any event he is not personally liable.

The second respondent's defence is a total denial.

In the affidavit in reply to the affidavit in support of the application the first respondent has stated that there was a Summons in Chambers filed by the solicitors of the plaintiff to sign final judgment against the respondents in respect of the same matter. It is alleged that the application was dismissed and the judge ordered the Civil Suit to be withdrawn with liberty to file afresh after other parties were added as co-defendants. From the court file it would appear that the Summons in Chambers was issued on February 17, 1973 but there is nothing to show that the application was heard.

In the circumstances I feel that it is not improper for me to hear the application and decide on its merits.

Mr. Peddie counsel for the applicant submitted that there is no defence disclosed and that it is within the inherent jurisdiction of the court to strike out the statement of defence as frivolous and vexatious and an abuse of the procedure of the court and enter judgment for the plaintiff (see *Rev. Oswald Joseph Reichel* v. *Rev. John Richard Magrath*(1)). Mr. Peddie also cited the case of *Remington* v. *Scoles*(2) to show that where a defendant delivered a statement of defence in which he either denied or refused to admit each of the allegations in the statement of claim but set up no case of his own, the court may, in the circumstances of the case find the defence to be frivolous and vexatious and one which ought to be struck out as being an abuse of the procedure of the court.

Mr. Peddie also urged the court to consider section 44(1) of the Contracts Act, 1950 concerning joint promisors' liability and the plaintiff's entitlement to enforce remedy against any of the joint promisors.

Encik Adam counsel for the respondents argued that no notice was given in accordance with O.64 r.13 of the Rules of the Supreme Court. To my mind this irregularity, if any, does not in the light of O.70 r.1(1) nullify the proceedings. Apart from this Encik Adam also raised the question of *res judicata*. In my view this question does not arise in the present case.

The question that really calls for determination in the present case is whether the respondents have shown any substantial defence. In so far as the second respondent is concerned he has completely failed to raise any defence. And as for the first respondent I find that he has also failed to show any real and substantial defence. The letters produced by the applicant in support of the application do show that the plaintiff did carry out the works pursuant to the request by the solicitors acting for both the respondents and in this respect the respondents have made no denial at all. The circumstances in the present case do show that the statement of defence of both the first and the second respondents to be frivolous and vexatious and an abuse of the process of the court and I therefore see no reason whatever to disallow the application. For these reasons I hereby order the defence of both respondents to be struck out and that final judgment be entered in terms prayed in favour of the applicant with costs.

Application allowed.
Defence to be struck out.

Solicitors: *Skrine & Co.; T. Tharu & Co.*

KUMPULAN PEMBINAAN (M) SDN. BHD. v. TRACTORS (M) BHD.

[O.C.J. (Abdul Hamid J.) August 22 and November 14, 1977]
[Kuala Lumpur — Civil Suit No. 2312 of 1976]

Practice and Procedure — Application to strike out statement of claim — Application involved issues of law and fact — Inapplicability of R.S.C. 1957, O. 25 r. 4.

The plaintiffs claimed against the defendants a sum of $63,784.84 for loss and damage suffered due to wrongful repossession of a tractor under a hire purchase agreement. The plaintiffs alleged that after the termination of the hiring of the said tractor, the plaintiffs offered to purchase it from the defendants. The plaintiffs contended that there was an outright purchase with deferred payments. There was default in the payment of the balance of the purchase price and the defendants wrongfully repossessed the tractor exercising the right under the Hire Purchase Act 1967. The plaintiffs' contention was that the defendants had no such right and the Act did not apply as this was essentially a case of debt due and payable.

The defendants argued that there was no loss or damage suffered by the plaintiffs and that the plaintiffs could not bring this action against the defendants on the ground that the dispute, if any, arising out of the said repossession was settled by a compromise between the parties. The defendants admitted repossessing the tractor but denied that it was wrongful. The defendants applied to strike out the statement of claim.

Held: (1) the application did not squarely fall within the scope of Order 25 R.S.C. which primarily covered a point of law which, if decided in one way, was to be decisive of litigation; Order 25 rule 4 only applied to an application which clearly related to a plain and obvious issue of law;

(2) in this case in view of the points of law involved and the facts which seemed to be in dispute, the court was not satisfied that the plaintiffs' contention was devoid of any merit whatsoever and therefore this was not a case which the court ought to summarily strike out the statement of claim.

Cases referred to:-

(1) In *re Harmony and Montague Tin & Copper Mining Co.; Spargo's Case* (1873) L.R. 8 Ch. App. 407.

(2) *Re Moody* Australian Bankruptcy Cases Vol. 14 p. 51.

CIVIL SUIT.

T. Thomas for the applicants/defendants.

Jag-jit Singh for the respondents/plaintiffs.

Abdul Hamid J.: The plaintiffs are claiming a sum of $63,784.84 for loss and damage suffered due to wrongful repossession of one unit of Caterpillar Tractor Model D7F bearing serial No. 91E697 under a hire purchase agreement dated April 5, 1975 made between the plaintiffs and the defendants.

The plaintiffs allege that after the termination of the hiring they applied to purchase the tractor from the defendants and pursuant to the offer the defendants sold the tractor for a purchase price of $173.500.

The plaintiffs contend that this was an outright purchase with deferred payments. They also contend that they paid a total sum of $121,450 commencing on April 5, 1975 and thereafter on the 5th of each month until September 5, 1975.

There was default in the payment of balance purchase price and the defendants wrongfully repossessed the tractor exercising the right under the Hire Purchase Act, 1967 (I shall hereafter call "the Act"). It is the plaintiffs' contention that the defendants had no such right and the Act did not apply as this was essentially a case of debt due and payable.

The grounds in support of the defendants' application to strike out the claim are set out in the affidavit affirmed by one Wan Chee Chuan Credit Control Manager of the defendant company. It is the defendants' contention that there was no loss or damage suffered by the plaintiffs and that the plaintiffs cannot bring this action against the defendants on the ground that the dispute, if any, arising out of the said repossession was settled by a compromise between the parties.

Repossession has not been disputed but the defendants deny that it was wrongful. It is averred that due to the plaintiffs' default in payment the defendants served on August 15, 1975 on the plaintiffs' notice intimating their intention to repossess pursuant to section 15 of the Act unless arrears amounting to $60,699.19 were paid by the plaintiffs within 21 days of the notice. As no payment was made the defendants repossessed the tractor on November 4, 1975. Notice to the plaintiffs was also given for the plaintiffs to choose either to reinstate or finalise the hire purchase agreement.

It is maintained that on November 27, 1975 the plaintiffs wrote to the defendants advising that they would choose reinstatement (see "WCC4"). It is also maintained that the plaintiffs and the defendants then agreed to the reinstatement of the hire purchase agreement upon the plaintiffs making the following payments —